HON'BLE SHRI G.S. SINGHVI, THE CHIEF JUSTICE
AND
HON'BLE SHRI JUSTICE G.V. SEETHAPATHY

WRIT PETITION NO.17627 OF 2006

BETWEEN

Sri Vishnu Explosives Private Limited,
Secunderabad & another

.....

Petitioners

And

Coal India Limited, Kolkata & others

.....Respondents

::O R D E R::

Counsel for the Petitioners : Shri Bimal B. Bhaskar

Dated: 25.08.2006

Per G.S. SINGHVI, CJ

This is a petition for grant of a declaration that action of

Coal India Limited (Respondent No.1) to disqualify petitioner No.1 in the matter of award of running contract for supply of Cartridge Explosives and accessories as indicated in Annexure-I by Chairman and Managing Director of Respondent No.1 is illegal and arbitrary. The other prayer made in the writ petition is to issue a writ of mandamus to Respondent No.1 to reconsider the decision to disqualify Petitioner No.1 in the matter of award of contract for supply of the aforementioned goods.

Petitioner No.1 is a private limited company engaged in the business of manufacture of Water Gel Slurry explosive. It is having a factory at Nandanam Village, Bhongir Mandal, Nalgonda District. It is also registered as a Small Scale Industry. Petitioner No.2 is the Managing Director and shareholder of Petitioner No.1. On 5-8-2005, Respondent No.1 accepted offer given by Petitioner No.1 for supply of Cartridge Explosive and its accessories to all its subsidiary companies and entered into a running contract on the terms and conditions specified in Fax No. (040) – 27849234 dated 5-8-2005. After 6 months and 23 days, Chief General Manager (MM) of Respondent No.1 sent fax message to Petitioner No.1 with the request to continue to supply Cartridge Explosives and its accessories for a period of four months with effect from 1-3-2006 or till the finalization of new running contract subject to the following terms and conditions:

i) The price payable during extended validity period of Running Contract shall be the existing Running Contract prices or the prices to be finalized in the new Running Contracts whichever is lower.

ii) The quality to be allocated during the extended period shall be regularized against the new R/C

quantity if awarded to you. The monthly allocation against the new R/C shall be issued accordingly.

iii) If you are disqualified against the new tender or your supply during extended period may exceed the new R/C quantity, if awarded, for 2006-07, the supply made during the extended period shall be treated as extra allocated quantity over the existing R/C at the lower rate as defined at Sl.No.(i).

iv) In case of your disqualification in the new tender (i.e. Price bid is not to be opened), issue of monthly allocation shall be stopped immediately from the next month.

v) This is without prejudice to the rights of CIL to take any action whatsoever in terms of the provisions of the existing Contract.

vi) All other terms and conditions of the existing Running Contract shall remain unaltered during the extended period."

After another two months, Respondent No.1 issued tender notice dated 2-5-2006 whereby offers were invited for supply of Cartridge Explosives and its accessories for a period of one year. Immediately after receipt of the copy of letter No.CIL/C2D/ SEC.II/ CARTRIDGE EXPLOSIVES AND ACCESSORIES/2006-07/442 containing the terms and conditions of proposed contract, Group President of Petitioner No.1 sent letter dated 10-5-2006 to the General Manager (MM) of Respondent No.1 and protested against the conditions incorporated in the tender notice by alleging that the same were extremely unreasonable and disadvantageous to small scale industries and were contrary to the policy of the government to encourage small scale industries. For the sake of reference, opening paragraph as also paragraphs 1 (a), (b), (c) and 2 of letter

dated

10-5-2006 are extracted below:

"The conditions of NIT issued by Coal India Limited for procurement of Bulk & Cartridge Explosives and accessories for the year 2006-07 is totally draconian and imposes tough eligibility criteria to keep the Small Scale Industries out of bidding process.

While the Government of India's policy is to encourage Small Scale Industries, CIL's NIT is totally anti SSI policy and the conditions of the same cannot be practically fulfilled.

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1. **<u>Technical Evaluation</u>:**
   a) The technical evaluation procedure proposed in the NIT is totally against the SSIs. The SSIs cannot invest beyond 1 crore rupees in plant and machinery and engage more than 40 workmen to be within the definition of SSI. The CIL NIT imposes conditions that the supplier has to have number of BMD vehicles and supporting plants in the subsidiaries to secure maximum marks to qualify for bidding. This cannot be fulfilled as the SSIs have restricted investment capacity. Similarly we cannot appoint workers and engineers beyond forty as stipulated in the SSI policy of Government of India. Therefore, we cannot secure the marks stipulated in the NIT condition to quality for bidding.
   b) In case of Cartridge explosives, the new NIT stipulates that we must have magazine in the subsidiaries where we are supplying our explosives. We have been supplying explosives for several years to the extent of 90% of our allocated quantity and hence the condition of maximum number of magazines at the subsidiary

are irrelevant and to be removed. As long as the supplier is executing the Rate Contract to the extent of 90% without interruption, the conditions on magazine at the subsidiaries should not be insisted and should not be considered for marks.

c) Regarding technical service engineers, CIL should not insist for one mining engineer for every 300 tonnes of supply quantity. This should be at best one mining engineer for one subsidiary or for each 1000 tonnes of supply quantity. Also when a diploma mining engineer is rendering equal service compared to a Graduate Mining Engineer CIL should not insist for a mining engineers to be posted for the technical services. It will be pertinent to mention here that in many PSUs Diploma Mining/Mechanical Engineers are holding senior and responsible positions.

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2. <u>Restriction on offered quantity</u>:

The restrictions imposed on quantity to be offered i.e. 60% of the licensed capacity by CCE of each supplier is unrealistic. Any supplier has his own commitments and quantity being offered to CIL depends on each supplier's ability and availability of balance quantity after fulfilling commitment for other customers in public and private sector. Therefore, the condition imposed for the minimum offered quantity should be eliminated.

In fact, the actual order quantity from CIL in the past has never been even 50% capacity of any supplier."

General Manager (MM) of Respondent No.1 responded to the protest raised on behalf of petitioner No.1 by sending communication dated 31-5-2006 requiring the latter to submit tender as per the conditions specified in NIT. Thereafter, Petitioner No.1 submitted tender document along with letter dated

1-6-2006. Vide letter dated 15-6-2006, General Manager (Production) of Respondent No.1 directed Petitioner No.1 to send clarification with regard to condition No.1 incorporated to Annexure-II appended to the NIT. Petitioner No.1 sent reply dated 16-6-2006.

It appears that the tender of Petitioner No.1 was rejected at the stage of technical evaluation of the bid because it did not satisfy the criteria specified in the NIT. This is evinced from communication dated 3-7-2006 sent by Group President of Petitioner No.1 to General Manager (MM) of Respondent No.1. Group President of Petitioner No.1 also sent letter dated 7-8-2006 to General Manager (MM) of Respondent No.1 requesting the latter to qualify Petitioner No.1 for participation in the next stage of tender process, but could not convince the authorities of Respondent No.1 to entertain his request.

Having failed to persuade the authorities of Respondent No.1 to consider its tender for evaluation of the price bid, Petitioner No.1 and its Managing Director have filed this petition.

Sri Bimal B. Bhaskar, learned counsel for the petitioners argued that the decision of Respondent No.1 to disqualify Petitioner No.1 at the stage of technical evaluation of the bid is liable to be nullified because the reason which prompted Respondent No.1 to take such a decision is wholly arbitrary and extraneous. Learned counsel emphasized that the solitary reason which weighed with the authorities of Respondent No.1 to disqualify Petitioner No.1 is the alleged non-supply of LD explosives to the subsidiaries of Respondent No.1 against

allocated quantities, though, as a matter of fact, Petitioner No.1 had supplied the allocated quantity of explosives etc. to the extent of 91.71% as against the required percentage of 87.5. Learned counsel then submitted that Petitioner No.1 could not have been disqualified on the ground of failure to supply 100% quantity of coal to the subsidiaries of Respondent No.1 for which oral orders had been placed from time to time.

In our opinion, the grievance made by the petitioners, which is reflected in the arguments of the learned counsel, cannot be entertained because they have not produced any material to show that their tender was rejected not on the ground of non-fulfillment of the conditions enumerated in the NIT but on the ground of non-supply of the quantity of explosives in the year 2005-06 in furtherance of the oral orders placed by the subsidiaries of respondent No.1. The tenor of communication dated 10-5-2006 sent by Group President of Petitioner No.1 prima facie shows that Petitioner No.1 does not fulfill the conditions specified in the tender notice. If that was not so, then there was no occasion for the Group President of Petitioner No.1 to have protested against the arbitrary and onerous nature of the conditions. In any case, we are satisfied that the petitioners should have first called upon Respondent No.1 to disclose the reasons for disqualifying Petitioner No.1 at the stage of technical evaluation of the bid. This could have been done by filing appropriate application under the Right to Information Act, 2005. They could have filed writ petition after getting the requisite information from Respondent No.1. The petitioners would also have been justified to seek intervention of

the Court if Respondent No.1 had refused to disclose the reasons for disqualification of Petitioner No.1 at the stage of technical evaluation of the bid. However, the fact of the matter is that Petitioner No.1 did not make any effort to elicit the reasons for rejection of its bid and other related information from Respondent No.1 and filed this petition without disclosing any tangible cause.

There is another reason for not entertaining the petition. In para 'q' of the grounds of the writ petition, the petitioners have made a mention that Respondent No.1 has awarded contract to other prospective suppliers totally ignoring the terms and conditions framed in the tender document. None of the persons who have been selected by Respondent No.1 for award of contract for supply of explosives and accessories has been impleaded as party to the writ petition. Therefore, no order can be passed by the Court, which may prejudicially affect the right of such person.

With the above observations, the writ petition is dismissed leaving the petitioners free to make an application to Respondent No.1 under the Right to Information Act, 2005 for disclosure of the reasons for not entertaining their bid and also for giving other related information. If any such application is made by the petitioners, the concerned authority of Respondent No.1 is expected to decide the same within a period of two weeks of its submission. After obtaining the requisite information, the petitioners shall be free to file fresh petition.

G.S. SINGHVI, CJ

G.V. SEETHAPATHY, J

25.08.2006
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